prescription of prices is a complicated matter, with concomitantly complicated procedures.[25] There is no basis in the statutory language or in sound policy to find that the 1992 Act created such a right by implication. Instead, it should be left to the cable operator to reconfigure its prices. All appeals of basic rate proceedings should go to the Commission rather than the local courts. The regulations are being devised by the Commission and it should be their arbiter. This will ensure uniform interpretation.

In addition, the Notice asks whether certain increases in costs (e.g., taxes and programming) outside of the cable operators control should not be deemed price increases subject to notice or review. As these costs are clearly exogenous, it is fair to allow them to be passed on without notice or prior regulatory review. Congress clearly had appropriate "pass throughs" in mind:

> This subsection [basic service rate regulation] is intended to permit the Commission to develop a system of "pass throughs" or other appropriate regulatory mechanisms ....

House Report at 82.

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[25] See 47 U.S.C. Section 205.

D. Regulations Governing Rates Of The Basic Service Tier

1. The Commission Must Reject Cost-Of-Service Rate Regulation

The distorted incentives and fiscal burdens of cost-of-service regulation should not be imposed upon the cable industry and cable consumers. As the Commission observed in its Price Cap proceeding, "rather than encourage socially beneficial behavior by the regulated firm, rate of return actually discourages it."[26] In this regard it is critical for the FCC to acknowledge that virtually any regulatory system based upon costs can produce the same unwholesome effects recognized by the Price Cap Order with respect to traditional rate-of-return.

There are no surprises here. The shortcomings of public utility regulation have been studied and documented at length by the Commission and outside experts. A "growing literature has identified various potential distortions in input usage, output levels, pricing, and other dimensions of regulated firm conduct resulting from the application of ratebase regulation." Duvall & Pelcovits, "Reforming Regulatory Policy for Private Line Telecommunications Services: Implications for Market Performance" 2 (1980). The unintended consequences of cost-of-service regulation can be measured from both static and dynamic perspectives. See, e.g., Cornell & Webbink, "Common Carrier Regulation and Technological Change: The New Competition in the

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[26] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, 4 FCC Rcd 2873, 2889 (1989)(Report and Order and Second Notice, hereafter cited as "Price Cap Order").

Communications Industries," in Joint Econ. Comm., 96th Cong. 2d Sess., Government Regulation: Achieving Social and Economic Balance 198 (1980).

The correlation of a firm's profitability with the extent of its invested capital will necessarily tend to stabilize technology. Firms are discouraged from rapidly adjusting to meet new opportunities created by shifts in consumer demand or improvements in technology. New and lower cost curves are discouraged.

Price cap regulation, unless deployed in its purest, theoretical form, will not readily solve these problems. Because the Commission's efforts to date in the Price Caps proceedings have failed to definitively sever prices from costs, they are unacceptable tools here:

> [B]oth common sense and rigorous theory make it clear that as long as the ultimate test for prices is a regulated firm's own costs, ...incentives for efficient operation and innovation will be below competitive levels.

See R. Schmalensee, "The Social Costs of Rate of Return Regulation" at 8, filed before the Federal Communications Commission, CC Docket No. 87-313, Appendix B to Comments of American Tel. & Tel. (filed Oct. 19, 1987). The principal problem with price caps, as implemented in the real world, is that of adjustment. Regulators are not willing, and may be unable, to commit to pure price caps. Of course, some periodic adjustment is necessary:

> Without any adjustment, price caps will eventually lead to some crisis situation, either one of financial distress or one of unduly high profits for the firm.

I. Vogelsang, "Price Cap Regulation of Telecommunications Services: A Long-Run Approach at ix (Rand 1988). There are in fact substantial political pressures which impair a regulator's ability to commit:

> A regulatory agency is likely to be subjected to considerable pressure to change the price cap or price cap formula over time. If a firm regulated by price cap begins to earn large profits, consumers will no doubt petition the regulator to lower the price in a core market. On the other side, if profits are very low, a regulated firm may seek a higher core service price cap on the grounds that a higher price is need[ed] to preserve financial viability. <u>If the firm believes that such pressure from interest groups (including the firm itself) can influence the price cap, then the cap will no longer be viewed as exogenous to the firm, and it is not clear whether any of the efficiency properties earlier described to price cap can be realized.</u>

R. Braeutigam & J. Panzar, "Diversification Incentives Under 'Price-Based' and 'Cost-Based' Regulation," at 27 (1988). The FCC's price cap plans specifically require a periodic review and thus actually formalize this deficiency. As Brauetigam and Panzar have observed, this mechanism provides the regulated firm with "the incentive to respond to such a scheme of 'price level' regulation as though it were actually subjected to rate of return regulation." <u>Id.</u> at 27-28.

Other problems inhere in the actual implementation, vis-a-vis the theoretical application, of price caps. The desired efficiencies of price caps -- improved innovation, removal of the

A-J effects, etc. -- assume that the regulator has perfect information:

> [U]nder complete information the boundaries on price caps which lead to Pareto efficient market outcomes ... are assumed to be known. However, in practice those boundaries may not be known (or even knowable) when the price cap is set. If the price cap is set too low, the economic viability of the firm and the provision of core service may be threatened. If the price cap is set too high, core service ratepayers will be losers.

Id. at 26. We do not mean to suggest that the Commission's efforts to improve the state of telephone regulation should not have been undertaken. But it is imperative that the Commission recognize and acknowledge explicitly that the state of the art telephone regulation remains quite imperfect, and does not provide a model for cable reregulation which one could confidently predict will improve consumer welfare.

The observations made by Professor Alfred Kahn and Dr. Irwin Stelzer over one decade ago, in the context of making recommendations to then-Governor Hugh L. Carey regarding the appropriate regulatory environment for New York State communications industries, applies today with equal force:

> [C]able is undergoing the most dramatic development from a simple system for importing distant signals into remote and sparsely populated areas to two-way communications systems providing a wide range of informational, entertainment and business services....[27]

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[27] See "Telecommunications in New York State: Redefining the Role of Government." New York State Executive Chamber, Office of Development Planning (1981), Appendix B (memorandum of March 25, 1981 from Alfred E. Kahn and Irwin M. Stelzer to Gov. Hugh L. Carey).

This is precisely the kind of dynamic situation in which the application of traditional regulatory concepts and techniques is most likely to obstruct the full development of that potential.

The Report continued, recommending that regulation of cable rates be limited exclusively to the basic tier consisting of the importation and distribution of a number of signals, and further, that the form of regulation remain in its then-current form:

> a kind of pragmatic bargaining process between the local bodies and the cable companies. Specifically, we would strenuously resist any attempts to convert it to the traditional public utility mold, basing allowable rates on an acceptable return on invested capital, with all its inescapable paraphernalia of uniform systems of accounts, valuation of rate base, allocations of investment and operating costs between "basic" and other services, and estimation of cost of capital.[28]

While plainly the cable industry has dramatically advanced since the time these words were written, they remain applicable today. The radical technological developments which promise to revolutionize both the video markets and the local transmission markets -- described in Mr. Coblitz' paper -- are plainly examples of the technical dynamism which Professor Kahn identified as being at risk under cost-based regulation.

The readily identifiable problems and costs associated with cost-of-service regulation will inhere to some degree in any system that involves costs on an ongoing basis. As has been examined at length, any true-up requirements inevitably return the regulation to cost concepts. So does the proposed Appendix A, that specifies "Cost Accounting Requirements" for the cable

[28] Id.

industry, again reinviting the problems that this Commission has strived so hard to undo over the past twenty-five years. The Commission must eschew any remnant of cost-based regulation to the maximum extent permissible under the statute.[29] Indeed there is every reason to believe Congress intended the Commission to avoid common carrier/public utility regulation in promulgating its rules.

From the outset, Congress did not consider traditional cost-of-service rate regulation a desirable approach to basic service rate regulation:

> The Committee is concerned that several of the terms used in this section are similar to those used in the regulation of telephone common carriers. It is not the Committee's intention to replicate Title II regulation. The FCC should create a formula that is uncomplicated to implement, administer, and enforce, and should avoid creating a cable equivalent of a common carrier "cost allocation manual."

House Report at 83.

Instead of confining the Commission to any specific method to regulate basic rates, Congress gave the Commission broad discretion to select the appropriate regulatory scheme:

> [T]he conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purpose of these changes is to <u>give the Commission the authority to choose the best</u>

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[29] As a result, there is no basis for the requirements set out in proposed Appendices A and B. There is reason to believe that in the case of subscriber equipment used to receive only basic service, Congress left the Commission no discretion but to employ some notions of costs in developing rates for such regulated equipment. This narrow area, which will itself undoubtedly be of limited duration as competition drives equipment prices to cost, should not be extended to programming service regulation.

method of ensuring reasonable rates for the basic service tier and to encourage the commission to simplify the regulatory process.

H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62 (1992)(emphasis added)("Conference Report").

Although the Congress accorded the Commission broad authority to choose the best method of regulating the basic service tier, it also instructed the Commission to "simplify the regulatory process." Id. Congress secured a "simplified" approach by adopting section 623(b)(2)(A), which states:

> In prescribing [basic service rate regulations], the Commission--(A) shall seek to reduce the administrative burden on subscribers, cable operators, franchising authorities, and the Commission.

It is clear that cost-of-service regulation does not comport with Congressional goals because it is not "simple" to administer. Instead, the Commission, cable operators, and local franchise authorities would be severely burdened with cost-of-service regulation. Cost-of-service regulation will require regulatory agencies to identify, measure and verify costs of the cable operator. There will undoubtedly be extended rate proceedings to determine the appropriate rate levels and structures. Disagreements regarding the cost of capital, the need for attracting more capital to expand and upgrade, and the proper rate of return are likely. The administrative costs associated with resolving these complex issues will be enormous.

From this discussion it becomes plain that the Notice's tentative conclusion to utilize a benchmark approach to basic service tier regulation is necessary and appropriate under the statutory scheme as well as sound public policy.

2. The Commission Should Adopt The Benchmark Approach for Basic Service Rate Regulation

The benchmark approach satisfies both of the main goals Congress had for the Commission in devising "the best method" to regulate basic service rates. That is, it will be simple for all parties to use and will ensure reasonable rates. In addition, the statutory factors enumerated in section 623(b)(2)(C) that the Commission "shall take into account" will be subsumed by the benchmark.

The Notice proposes several alternatives for selecting a benchmark: rates charged by systems facing effective competition, past regulated rates, average recent rates, cost-of-service, and price caps. As is evident from the earlier discussion, we respectfully submit that the last two alternatives are untenable and at odds with legislative policy. Similarly, the third proposal, using actual current rates adjusted for outliers does not appear to satisfy the statutory goal of ensuring that rates for the basic service tier approximate the rates which "effective competition" would have rendered. See Section 623(b)(1). Conceptually, either of the first two benchmarks supports the legislative design by utilizing baselines which the Congress viewed as reasonable. In the actual application of either of these proposed benchmarks, however, it is crucial for the Commission to appreciate that there will be inevitable and nontrivial measurement problems which in turn will require further adjustments.

These problems derive from a number of different factors: by way of example only, the basic service tier in 1993 post-Cable Act implementation will bear only some resemblance to the basic tier in 1986 or even 1992. Any system for which the basic tier has remained the same and constant over these time periods is exceptional. Per channel benchmarks will account for some, but not all of this need for adjustment, because the per channel costs tend to decline as the number of channels rises. Similarly, data which can be confidently used may not be readily available because of the wide variety of marketing approaches utilized to date by the industry. In some cases, equipment charges may have been partially or wholly bundled in with service charges; in other cases, a cable operator may have always charged separate identifiable prices. Comcast has used the first approach in some systems, the second in others. Because of these and many other measurement problems, we respectfully reserve comment on the benefits of one benchmark over the other until the industry-wide data submission, and the FCC's proposed uses of it, can be reviewed in detail.

The Notice also proposes as part of the benchmark approach an overall adjustment factor to reflect increases in the costs of doing business. Plainly, such an adjustment is legally required to make the benchmark approach succeed. However, the adjustment should remain as simple as possible; the suggestions for other adjustments to "customize" the benchmark (Notice at ¶ 37) lead the Commission and the industry down the costly path of cost-based regulation, a journey all have agreed is not worth taking.

One other observation is necessary, relating to additional proposals in the Notice regarding price adjustments post-implementation. Both the discussion of the "customization" proposal, as well as the proposal to include a price cap formula as a benchmark regulation component (Notice at ¶ 34), evidence a common concern which, we believe, is unfounded. The apparent concern is that deployment of a nationwide benchmark will drive all cable operators to a common price. There is in addition a related fear that for operators currently pricing below the benchmark, there would be created an opportunity to "quickly ... raise their rates to that benchmark price." Id. But these concerns are unsustainable, especially in light of the entire legislative premise that cable operators have been acting as unregulated monopolies and charging monopoly prices for basic services. Whether or not that is the case, economic learning alone dictates the presumption that cable companies, like any rational business, are charging the profit-maximizing price. Given that fact, a cable operator is hardly able to go from an unregulated environment to a regulated one and suddenly and dramatically raise its prices. Such adjustment factors are simply unnecessary.

III. CABLE PROGRAMMING SERVICES

A. The Commission Must Adopt A Cable Programming Service Rate Regulatory Scheme That Is Only Intended To Catch The "Bad Actors" Charging Egregious Rates

The Notice at n. 127 discusses the appropriate standard of reasonableness for cable programming services and whether the standard should be different from the basic service tier standard. The issue is whether Congress intended cable programming service regulation as a general comprehensive regulation scheme similar to the basic service rate scheme or structured only as a way to catch the bad actors that charge egregious rates. Some aspects of the Notice suggest an inclination to treat basic service rate regulation and upper tier rate regulation the same -- to create a comprehensive rate regulation scheme for both basic and expanded basic services. Comcast respectfully submits that this approach is contrary to the statutory scheme and legislative history of the Act.

An analysis of the statutory scheme and the legislative history including the committee reports, floor debates and hearings reveals that Congress did not intend to duplicate the basic service rate scheme for cable programming services, but intended only to create a mechanism to protect against egregious pricing abuse through a complaint mechanism.

The cable programming rate scheme of section 623(c) has one major component: a complaint mechanism to identify unreasonable upper tier programming rates in individual cases. In promulgating rules to implement this component the Commission is directed to adopt a minimum showing required for complaints. Thus, Congress merely intended the Commission to bring those unreasonable rates under special scrutiny.

Congress' straightforward goal of intervening only in the case of egregious cable programming services is also fully revealed in the legislative history. The House and Senate agreed that only a minority of cable systems have unreasonably raised upper tier rates and only those systems should be vulnerable to the complaint mechanism. The House Report states:

> While most cable operators have been responsible about rate increases in this deregulated environment, a minority of cable operators have abused their deregulated status and have unreasonably raised subscriber's rates ... In order to protect consumers, it is necessary for Congress to establish a means for the FCC, in individual cases, to identify unreasonable rates and to prevent them from being imposed upon consumers.

House Report at 86 (emphasis added).

In addition, the "background and need for legislation" section of the House Report states:

> The committee finds that rate increases imposed by some cable operators are not justified economically and that a minority of cable operators have abused their deregulated status and their market power and have unreasonably raised rates they charge subscribers. The committee believes it is necessary to protect consumers from unreasonable cable rates.

House Report at 33 (emphasis added).

Several statements during the floor debates support the interpretation that the upper tier rate scheme is only intended to catch bad actors charging egregious rates. Statements by two of the framers of the 1992 Cable Act, Senator Inouye and Rep. Markey, are notable. Senator Inouye stated:

> In addition [to basic tier regulation], both S.12 and the conference report include what could be called a bad actor provision. The conference report provides that the FCC may regulate, on a case-by-case basis, rates for tiers of programming other than basic if it receives a complaint that demonstrates that a rate increase is unreasonable.

138 Cong. Rec. S14224 (daily ed. Sept. 21, 1992)(statement of Sen. Inouye)(emphasis added).

In an earlier debate on S. 12 Senator Inouye stated:

> In addition [to basic tier regulation], S.12 includes what could be called a "bad actor" provision. This bill gives the FCC authority to regulate rates for tiers of programming other than basic, if it receives a complaint that makes a prima facie showing that a particular rate increase is unreasonable, and [t]his will give the FCC the authority to regulate in individual cases where cable operators impose excessive increases on subscribers.

138 Cong. Rec. S561 (daily ed. Jun. 29, 1992)(statement of Sen. Inouye)(emphasis added).

Similarly, Rep. Markey, introducing H.R. 4850, stated:

> In addition to [basic rate regulation] the bill includes provisions to rein in the renegades of the cable industry by requiring the FCC, on a per case basis, to regulate unreasonable rates charged for service.

138 Cong. Rec. E1033 (daily ed. April 10, 1992)(statement of Rep. Markey)(emphasis added).

Statements made in the hearings further support this interpretation. One important statement was made by Senator Inouye:

> The majority of cable operators provide good service at reasonable rates. This legislation before us today is not intended to stifle the cable industry. Rather, it is intended to give the FCC the ability to control

those cable operators that have come to be known as "bad actors"....[30]

If the Commission adopts a cable programming rate regulation scheme that brings all services under actual regulation similar to the basic service rate scheme, it will supplant Congress' goal of only reining in the cable systems charging egregious rates for upper tier programming. To avoid this, the Commission should adopt a complaint mechanism designed to identify only those cable operators charging egregious rates.

Only those systems whose cable programming prices are outliers are subject to special governmental scrutiny under the 1992 Act. The mechanics surrounding this need not be especially complicated. The relevant prices are the aggregate rates for basic service and cable programming, including both expanded basic service and unregulated equipment. Through a sampling process, the Commission should survey the relevant prices on a per channel basis within system categories and identify a threshold at two standard deviations from the norm. Systems whose prices are beyond the norm on a per channel basis for their category would be subject to complaint. They would have the right either to lower their prices or to defend against a complaint should one be filed. Given the widely varying circumstances of cable system operations, there should be no limitation on the matters that can be raised by way of defense.

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30 Cable TV Consumer Protection Act of 1991: Hearings on S.12 before the Subcom. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102nd. Cong., 1st Sess. 1-2 (1991)(statement of Sen. Inouye)(emphasis added).

Of course, the Commission could adjust the two standard deviation formula if it proves to be excessively or insufficiently encompassing. But, especially given the practical effect of entertaining large numbers of complaints, prudence argues very strongly for minimizing the universe of pricing episodes susceptible to the complaint process. Assuming that cable programming fits a normal distribution, 2.5 percent of the cable programming pricing episodes would be subject to complaint. As a practical matter, a two standard deviation threshold could force the Commission to deal with hundreds of complaint cases each year.

The Notice expressly and wisely notes there is a problem with deploying such an approach repetitively. Over time the measured rates would reflect responses to the regulatory regime rather than independent industry performance. We believe a single measurement should be taken with the "bad actor" threshold adjusted each year on a formulary basis. This approach would remove uncertainty, permitting consumers and operators alike to know in advance what price levels would trigger the opportunity to file complaints. After an appropriate interval, say three to five years, the Commission could review whether the formula has proven useful in distinguishing pricing episodes that deserve special scrutiny from those that do not.

B. A Cable Programming Scheme Designed To Only Catch The Bad Actors Charging Egregious Rates Will Help Ensure Continued Growth In The Quality and Quantity Of Programming

There are also persuasive policy reasons to limit the scope of the cable programming complaint process: it will ensure that the quality and quantity of programming and other aspects of cable service are not threatened. A cable programming rate scheme as pervasive as the basic rate scheme would risk jeopardizing the quality and quantity of programming, including the introduction of new technologies. Since deregulation took effect in 1986, the cable industry has substantially invested in programming and other improvements to its systems. These facts have been noted by both the Congress and Commission. The House Report on the 1992 Cable Act states:

> The Committee finds that since deregulation took effect in December 1986, the cable industry, as the Committee hoped, has invested substantially in capital improvements and programming ... basic cable networks spent $1.5 billion for programming in 1991, an increase from $745 million in 1988, and more than four times the $340 million spent in 1984. Similarly, the typical cable system offers 30 to 53 channels today compared to the typical 24 channels or less before the Cable Act was enacted.

House Report at 31.

The Commission echoed the House's statement in the FCC study of 1990: "There is no question that the number of programming services offered by cable systems has increased substantially since the passage of the Cable Act of 1984." 1990 Cable Study at 4992.

Creating a cable programming services regulatory scheme that brings all services under actual regulation similar to basic rate regulation will stifle growth and the quality and quantity of programming. Only by adopting an approach designed to identify and review apparently excessive rates -- and no more -- will the Commission ensure growth in the quantity and quality of programming.

As already discussed, the Notice's proposals to simply ask the same questions and perhaps even give the same answers for the basic rate regulation scheme as that for cable programming service reflects a fundamental misunderstanding of the statutory scheme. There is, in essence, no rate regulatory regime as such for cable programming services. Rather, Congress has instructed the FCC to be prepared to receive complaints that the rates for such services have been unreasonable and to apply a remedy when such complaints are concluded to be accurate. Congress was very much attuned to the need for maximum flexibility here so as not to disrupt the continued growth in cable plant and cable originated programming which deregulation under the 1984 Act had brought. It therefore sought to target only the "excessive" and "abusive" rate practices of the "bad actors."

Neither cost-based nor even a benchmark approach can satisfy these concerns. Plainly, the best and most direct means of targeting the "bad actors" of the cable industry is by directly identifying a class which is likeliest to contain them. The Notice begins to suggest just such an approach by identifying current rates and targeting the top 2-5% of systems as measured in terms of rate levels. Notice at ¶ 46. Rather than use this as a benchmark, however, the Commission should simply identify the "outliers" through this process. These companies would be thereafter subject to complaints, as set forth in § 623(c)(3). All other operators would be entitled to the safe harbor of the industry norm. This approach would be fully consistent with Congressional policy, which had explicitly recognized that at least with respect to the expanded tiers of programming, "most cable operators have been responsible." House Report at 86.

Especially because Congress reasonably estimated that cable programming services face closer economic substitutes than does the basic "antenna service" tier, it is critical that the Commission establish and maintain a simple, minimally intrusive design for reaching the exceptional unreasonable rates for expanded programming.

C. The Exemption Of Per Channel Offerings Provides An Additional Margin Of Safety in Ensuring The Continued Growth In The Quality And Quantity Of Programming

The Notice identifies a potential anomaly in the 1992 Act. Notice at ¶¶ 95-96. The definition of "cable programming service" encompasses all tier programming other than basic, but excludes all "pay" programming. This raises the question how to categorize for regulatory purposes pay channels offered in bundles. The proposal to continue to treat such programming as exempt from "bad actor" scrutiny is correct. It recognizes the well established industry convention of offering multiple pay services -- often from unaffiliated vendors such as HBO and Showtime -- at a discount. The decision not to inhibit or otherwise regulate this industry practice reflects the recognition that, except in very unusual circumstances, it enhances rather than diminishes consumer welfare. So long as subscribers retain the option to buy each of the packaged services on a per-channel basis there is no reason for the government to seek to prevent or disturb marketing practices that lower consumers' costs.

The reimposition of rate regulation may, as the Commission apparently recognizes, Notice at ¶ 96, influence cable operators and programmers to make increasing use of per-channel offerings. Much depends upon how the "bad actor" cable programming complaint mechanism is defined and administered. If it creates disincentives to add services to the cable programming tiers, programmers may find it necessary or desirable to configure their products as pay-per-channel offerings. If so, the same approach to packaging suggested for the traditional pay programming services should apply. The offering of a separate per-channel price for services puts them in a different regulatory category from the "cable programming." The offering of two or more such services in a reduced-price package does not transform them into "cable programming."

The preservation of the distinction is important. It serves to preserve an opportunity for new, or better, or more diverse programming in the event that mistakes in the regulation of basic service or of cable programming diminish demand. This is consistent with Congress' policy in passing the 1992 Act, section 2(b)(1),(3).[31] It affords an additional possibility for increases in the quantity, quality, and diversity of programming available to the consumer.

D. Complaint Procedures For Cable Programming Services

The procedures that govern the complaint mechanism for cable programming services should be easy for all interested parties to understand. This is especially important because subscribers are potential complainants. The Notice makes a tentative conclusion that after the initial 180 day review period, complainants should have 30 days to formulate and file a complaint. Comcast supports this tentative conclusion. As long as the method for identifying "bad actors" and the form to complain remain relatively simple, 30 days from the time the operator provides notice of a rate increase[32] should be an adequate time to formulate and file a complaint. Once the complaint is served on the operator, it should have 30 days to respond. This is the same amount of time allowed in 47 C.F.R. § 76.7(d) to oppose a petition for special relief.

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[31] See supra, note 47.

[32] This could be in the form of an increase in a subscribers bill or other announcement.

The cable operator should be afforded a full opportunity to defend its pricing scheme. While there may be some tension between Congress' desire for simplifying procedures for resolving complaints and cable operators right to a full defense, the Commission cannot, consistent with the Constitution and the Administrative Procedure Act, construe the law to make the overriding values simplicity and efficiency. Because cable operators are subject to refunds, in case of overcharges, time devoted to fairly judging the issues will not injure subscribers.

IV. EQUIPMENT REGULATION

A. Cost-Based Regulation Of Equipment Under Section 623(b)(3) Does Not Apply To Equipment Used (In Whole Or In Part) To Receive Cable Programming Services

Section 623(b), which is entitled "Establishment of Basic Service Tier Rate Regulation," regulates solely the basic service tier. Section 623(b)(2) requires the Commission to promulgate regulations to carry out its obligations to ensure that the rates for the basic tier are reasonable. Section 623(b)(3) directs the Commission to include in such regulations:

> [s]tandards to establish, on the basis of actual cost, the price or rate for...installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit....[33]

Section 623(c) of the Act governs the regulation of any "cable programming service," which is defined as:

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[33] Section 623(b)(3)(A)

> [a]ny video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.[34]

Converter boxes and remotes which are used solely to receive the basic service tier are subject to cost-based price regulation under the section 623(b)(3) language quoted above. But converter boxes and other equipment used to receive a cable programming service, whether in lieu of or in conjunction with the receipt of the basic service tier, are regulated as a cable programming service under section 623(c).[35]

Cable programming services, including the equipment used to provide the services, are outside the scope of the rate regulation framework of section 623(b). Section 623(a)(2) clearly defines the dichotomy between sections 623(b) and 623(c). It provides that if the Commission finds that a cable system is not subject to effective competition:

> (A) the rates for the provision of basic cable service shall be subject to regulation...in accordance with the regulations prescribed by the Commission under subsection [623](b); and
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> (B) the rates for cable programming services shall be subject to regulation by the Commission under subsection [623](c).[36]

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[34] Section 623(l)(2) (emphasis supplied).

[35] See Section 623(l)(2).

[36] Section 623(a)(2) (emphasis supplied).

Because the definition of cable programming services includes within its ambit "[e]quipment used for receipt..."[37] of such services, the equipment is regulated under section 623(c), not section 623(b). This is true whether the equipment involved is (1) used solely to receive cable programming services, or (2) is also used to receive the basic service tier. In either case, the equipment is "used for receipt" of cable programming services and thereby falls within the definition of, and the statutory provisions governing, cable programming services.

Review of both S.12, as passed, and H.R. 4850, as passed, buttress this conclusion. S.12 defined cable programming service as:

> [a]ll video programming services, <u>including installation or rental of equipment not used for the receipt of basic cable service</u>, regardless of service tier, offered over a cable system except basic cable service and those services offered on a per channel or per program basis.[38]

H.R. 4850 contained the following definition of cable programming service:

> The term 'cable programming service' means any video programming provided over a cable system, regardless of service tier, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.[39]

At the House-Senate conference on S.12 the conferees adopted the House language but amended it to add the language at issue

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[37] Section 623(l)(2).

[38] 138 Cong. Rec. S762 (daily ed. January 31, 1992) (emphasis supplied).

[39] 138 Cong. Rec. H6563 (daily ed. July 23, 1992).

here -- "including installation or rental of equipment used for receipt of such video programming."[40] To read the Act to require cost-based rate regulation of equipment used to receive both the basic service tier and cable programming services would be to do what Congress did not; namely adopt the Senate language quoted above.

If Congress had adopted the S.12 definition of cable programming service, with its reference to "equipment not used for the receipt of basic cable service,"[41] the test of whether a given piece of equipment was subject to cost-based regulation under section 623(b) would be a different one. Under the Senate language, the determinative question is whether a converter box or remote is used to receive the basic service tier. Equipment so used is outside the Senate's definition of "cable programming service" and consequently subject to cost-based regulation under section 623(b).

But Congress did not adopt the Senate equipment language quoted above. Instead, the conferees adopted different language and crafted a different test -- whether the equipment in question is "used for receipt" of cable service programming.[42] This language, in contrast to the Senate bill, makes the determinative inquiry whether the equipment in question is used to receive

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[40] Section 623(l)(2); see also, Conference Report at 66.

[41] 138 Cong. Rec. S762 (daily ed. January 31, 1992); see also, Senate Report at 73.

[42] Section 623(l)(2).